

## What are the differences between access rights and custody rights?

A person with only access rights (the equivalent of “visitation rights”) cannot maintain a petition for the return of a child. Only parents with rights of custody to the child may petition for the return of an abducted child.<sup>1</sup> For example, the law of a country might provide that an unmarried father has no custody rights to the child. If the mother were to relocate to another country without father’s permission, father could not maintain an action for return of the child because the law of the child’s habitual residence does not confer custody rights on the father.

**Ne Exeat Clauses.** In 2010, the Supreme Court held in *Abbot v. Abbot*<sup>2</sup> that a parent with visitation rights coupled with a *ne exeat*<sup>3</sup> order confers a right of custody for a left-behind parent, entitling that parent to maintain an action for the return of a child. The Court found that the Convention’s definition of custody rights in Article 5<sup>4</sup> included a *ne exeat* clause because a *ne exeat* clause related to the right to determine the place where a child lives, and as such it bears on “the care of the person of the child.” The Chilean *ne exeat* clause in *Abbott* conferred a right to determine the child’s country of residence. Because neither parent could unilaterally establish the place of the child’s residence, they held a joint right of custody—and hence enforceable rights under the Convention.

The *Abbott* Court declined to address whether a restraining order that did not contain a “parental consent” provision—e.g., simply an order restraining the removal of a child from a state or country, would form the basis for a custody right. The Court did note in dictum that such an order might confer custody rights, stating that “Even a *ne exeat* order issued to protect a court’s jurisdiction pending issuance of further decrees is consistent with allowing a parent to object to the child’s removal from the country.”<sup>5</sup>

Some states routinely grant orders restraining the removal of a child from the state. California law provides for the automatic issuance of an order restraining both parties from removing the minor child or children upon the issuance of a summons, unless the other parent has given prior written consent or the court has issued an order permitting the removal.<sup>6</sup>

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1. See, e.g., *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993) (holding that a father with only court-ordered visitation rights may not seek the return of a child pursuant to the 1980 Hague Convention).

2. *Abbott v. Abbott*, 560 U.S. 1 (2010).

3. A *ne exeat* order typically prohibits a parent, or both parents, from removing a child from the jurisdiction of the court or prohibits moving a child across an international border without the permission of the court or the other parent. In U.S. courts the *ne exeat* order may be referred to simply as a restraining order preventing removal of a child from a particular city, county, or state, or from the nation.

4. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 97 (entered into force on Dec. 1, 1983). “[R]ights of custody’ shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”

5. *Id.* at 14.

6. Cal. Fam. Code § 2040(a)(1) (West 2012) provides for an order “[r]estraining both parties from removing the minor child or children of the parties, if any, from the state, or from applying for a new or replacement passport for the minor child or children, without the prior written consent of the other party or an order of the court.”

**Patria Potestas.** *Patria potestas* is a concept under civil law jurisdictions, principally Mexico and other Central and South American nations, that includes custody and rights to raise, care for, discipline, and represent their children in legal matters.<sup>7</sup> A person with *patria potestas* has custody rights under the Convention.<sup>8</sup>

The Ninth Circuit<sup>9</sup> has narrowly drawn an exception to finding rights of custody pursuant to *Patria Potestas* when the parties have a custody agreement that contains terms that are inconsistent with the concept of *Patria Potestas*. Additionally, courts have refused to find *Patria Potestas* rights where a parent relinquishes those rights in a court decree.<sup>10</sup>

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7. *Mota v. Castillo*, 692 F.3d 108, 117 (1st Cir. 2014) (quoting Patricia Begne, *Parental Authority and Child Custody in Mexico*, 39 Fam. L.Q. 527, 531 (2005)).

8. See, e.g., *Altamiranda Vale v. Avila*, 538 F.3d 581 (7th Cir. 2008) (Venezuela); *Whallon v. Lynn*, 230 F.3d 450, 459 (1st Cir. 2000) (Mexico); *In re B. del C.S.B.* 525 F. Supp. 2d 1182 (C.D. Cal. 2007) (Mexico); *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) (Argentina); *Aguilera v. De Lara*, CV14-1209 PHX DGC, 2014 WL 3427548 (D. Ariz. July 15, 2014); *In re S.L.C.*, 4 F. Supp. 3d 1338 (M.D. Fla. 2014); *Mendoza v. Silva*, 987 F. Supp. 2d 883 (N.D. Iowa 2013); *Gallardo v. Orozco*, 954 F. Supp. 2d 555 (W.D. Tex. 2013); *Garcia v. Varona*, 806 F. Supp. 2d 1299 (N.D. Ga. 2011).

9. *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) (The Ninth Circuit held that *patria potestas* did not confer rights of custody where the parents had executed a custody agreement that made no reference to the doctrine of *patria potestas*. The agreement itself provided father only with rights of visitation, “eliminating any basis for relying on *patria potestas*.”) (abrogated by *Abbott v. Abbott*, 560 U.S. 1 (2010)).

10. *Ibarra v. Garcia*, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007).